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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SEAN DELANEY,

Defendant and Appellant.

B294147

(Los Angeles County  
Super. Ct. No. MA028330)

APPEAL from a judgment of the Superior Court, Los Angeles County, Shannon Knight, Judge. Affirmed.

Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, and Steven D. Matthews and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Sean Delaney appeals from the judgment after resentencing, challenging under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) the court's order imposing, without a hearing on his ability to pay, a \$10,000 restitution fine and a \$20 court operations assessment. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Delaney Pleads Guilty to Two Counts of Attempted Murder and Admits Allegations in September 2005*

In 2004 Delaney attacked two African American men with a knife. Delaney admitted the only reason he stabbed them was because of the color of their skin.

In September 2005 he pleaded guilty to two counts of attempted murder. On both counts he admitted allegations that he committed a hate crime within the meaning of Penal Code section 422.75, subdivision (c);<sup>1</sup> that he personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a); and that he personally used a deadly or dangerous weapon, within the meaning of section 12022, subdivision (b). On one of the counts he admitted the allegation that he committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b).

On the attempted murder conviction with the gang allegation admission, the trial court sentenced Delaney to the upper term of nine years in prison, plus four years for the hate

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<sup>1</sup> Statutory references are to the Penal Code.

crime enhancement under section 422.75, subdivision (c), three years for the great bodily injury enhancement under section 12022.7, subdivision (a), four years for the gang enhancement under section 186.22, subdivision (b)(1)(A),<sup>2</sup> and one year for the weapon enhancement under section 12022, subdivision (b)(1), for a total of 21 years. On the attempted murder conviction without the gang allegation admission, the trial court sentenced Delaney to a term of two years four months (one-third the middle term of seven years), plus one year for the hate crime enhancement (one-third the middle term of three years), one year for the great bodily injury enhancement, and four months for the weapon use enhancement, for a total of four years eight months. Thus, Delaney's total prison sentence was 25 years eight months. The court also imposed a \$10,000 restitution fine under section 1202.4, imposed and stayed a \$10,000 parole revocation fine under section 1202.45, and imposed a \$20 court operations assessment under section 1465.8.

B. *The Trial Court Resentences Delaney in October 2018*

In August 2018 the Department of Corrections and Rehabilitation advised the court that Delaney's sentence was unauthorized. The Department pointed out that, because attempted murder is a violent felony (see § 667.5, subd. (c)(12)), the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C), rather than a four-year gang enhancement under section 186.22, subdivision (b)(1)(A), applied. (See *People v. Le* (2015) 61 Cal.4th 416, 421 [§ 186.22, subd. (b)(1)(C), imposes a 10-year enhancement when the defendant commits a violent felony]; *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [same]; *People v. Sok* (2010) 181 Cal.App.4th 88, 95 ["Because attempted

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<sup>2</sup> We'll come back to this in the next section.

murder is a violent felony within the meaning of section 186.22, subdivision (b)(1)(C), the trial court . . . properly applied a consecutive 10-year term for the criminal street gang enhancement.”].)

On October 16, 2018 the trial court resentenced Delaney. The court explained: “Mr. Delaney, the court was notified by the Department of Corrections that apparently . . . although the time, which was . . . 25 years eight months, there’s no problem getting to that amount of time, but the way that they got to the amount of time, was unauthorized. . . . You’re getting the same 25 years eight months, because that’s what everybody agreed to, but it needs to be calculated a little bit differently from how we did it.” The court again sentenced Delaney on the first attempted murder conviction to a prison term of 21 years, this time calculated as the lower term of five years, plus two years for the hate crime enhancement under section 422.75, subdivision (c), 10 years for the gang enhancement under section 186.22, subdivision (b)(1)(A), three years for the great bodily injury enhancement under section 12022.7, subdivision (a), and one year for the weapon enhancement under section 12022, subdivision (b)(1). On the second attempted murder conviction, for which the court stated “nothing is changing,” the court resentenced Delaney to the same four years eight months, as originally calculated.

Finally, the court again imposed a \$10,000 restitution fine under section 1202.4, imposed and stayed a \$10,000 parole revocation fine under section 1202.45, and imposed a \$20 court operations assessment under section 1465.8. Before imposing these fines and assessment, the court asked counsel for Delaney, “Do you wish to be heard with regard to fees?” Counsel for Delaney stated, “No, Your Honor.”

On November 19, 2018 Delaney filed a notice of appeal from the court's October 16, 2018 judgment.<sup>3</sup> Delaney also filed a request for a certificate of probable cause to challenge the gang enhancement, which the trial court denied.

## DISCUSSION

Citing our decision in *Dueñas, supra*, 30 Cal.App.5th 1157, Delaney argues “[t]his court should remand this matter so that [he] may request a hearing and present evidence demonstrating his inability to pay the \$20 court [operations assessment] and the \$10,000 restitution fine.” Delaney asserts that he “is indigent” and that there “has been no showing he has an ability to pay the fines and fees.”

As an initial matter, the People argue we should dismiss the appeal because Delaney did not obtain a certificate of probable cause and, as part of his plea, he “waived his appellate rights.” As the Supreme Court held in *People v. Stamps* (2020) 9 Cal.5th 685, however, a defendant does not need to obtain a certificate of probable cause when “seeking retroactive application of a subsequently enacted ameliorative provision, which [the defendant] contends has been incorporated into his plea agreement.” (*Id.* at p. 696.) In that situation, the defendant’s “appellate claim does not constitute an attack on the validity of his plea because the claim does not challenge his plea

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<sup>3</sup> On April 16, 2019 Delaney filed a motion in the trial court to obtain additional presentence custody credits, to correct a mistake in the court’s minute order and the abstract of judgment, and to strike the restitution fine and the court operations assessment. The superior court granted the first two requests but not the third. The record does not show whether Delaney appealed from the trial court’s ruling on this motion.

as defective when made.” (*Ibid.*) Although the defendant in *Stamps* was seeking retroactive application of an ameliorative amendment to a statute affecting the imposition of an enhancement, the same principle applies to an ameliorative court decision affecting the imposition of statutory fines and assessments. (See *id.* at p. 698 [where the defendant “does not seek to put aside or withdraw his plea” or “urge that his plea was invalid when made,” but instead “seeks relief because the law subsequently changed to his potential benefit,” the defendant’s appeal “does not attack the plea itself and does not require a certificate of probable cause”].)

Regarding whether Delaney waived his right under *Dueñas* to raise his ability to pay the fine and assessment the court imposed in September 2005 and reimposed in October 2018, the parties disagree whether Delaney’s waiver of appellate rights applies to this appeal. At the September 2005 sentencing hearing the prosecutor asked Delaney, “At this point in time do you waive and give up any appellate rights that you would have to contest this plea?” Delaney answered, “Yes.” The prosecutor asked, “In any way or form?” Delaney answered, “Yes.” The People argue Delaney’s “waiver encompassed his right to appeal the fine and fee.” Delaney argues his waiver of his right to contest his plea does not preclude this appeal because, although the prosecutor advised Delaney there would be a restitution fine of “between \$200 and \$10,000,” neither the prosecutor nor the court advised Delaney what the restitution fine would be or that Delaney had the right to argue he did not have the ability to pay a restitution fine above \$200. But even if, under the circumstances of this case, Delaney did not waive his right to appeal the imposition of the restitution fine and the court operations assessment, he forfeited the argument the trial court

erred in imposing them without allowing him to present evidence of his ability to pay.

“Section 1202.4, subdivision (b), states: ‘In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.’ A restitution fine under section 1202.4, subdivision (b), ‘is intended to be, and is recognized as, additional punishment for a crime.’ [Citations.] Under section 1202.4, subdivision (c), the trial court may not consider a defendant’s ability to pay when imposing the minimum restitution fine of \$300, but the court may consider the defendant’s ability to pay if the court imposes a restitution fine above the minimum.” (*People v. Montelongo* (2020)

55 Cal.App.5th 1016, 1033, petn. for review pending, petn. filed Nov. 17, 2020, S265597; see § 1202.4, subd. (d); *People v. Miracle* (2018) 6 Cal.5th 318, 356; *Dueñas, supra*, 30 Cal.App.5th at p. 1170, fn. 6.) The \$10,000 restitution fine the trial court imposed in September 2005 and imposed again in October 2018 far exceeded the statutory minimum (at the time) of \$200. By failing both times to object to the \$10,000 restitution fine and to present evidence he did not have the ability to pay it, Delaney twice forfeited the argument the trial court erred in imposing the fine without considering his ability to pay. (See *Miracle*, at p. 356; *People v. Avila* (2009) 46 Cal.4th 680, 729; *Montelongo*, at p. 1033; *People v. Smith* (2020) 46 Cal.App.5th 375, 395; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033.)

Delaney also forfeited his challenge to the \$20 court operations assessment under section 1465.8. At the time Delaney committed his offenses in 2004, and at the time he was convicted and originally sentenced in 2005, section 1465.8, subdivision (a)(1), required the court to impose a court operations

assessment of \$20 on each criminal conviction.<sup>4</sup> In *Dueñas*, decided years after Delaney’s original sentencing hearing and a few months after his resentencing hearing, this court held that imposing such assessments on “indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution” and that “due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant’s present ability to pay before it imposes [such] assessments.” (*Dueñas, supra*, 30 Cal.App.5th at pp. 1164, 1168; *People v. Montelongo, supra*, 55 Cal.App.5th at p. 1034; *People v. Belloso* (2019) 42 Cal.App.5th 647, 654-655, review granted Mar. 11, 2020, S259755.) But by failing to object to the \$10,000 restitution fine, which was 500 times greater than the \$20 court operations assessment, Delaney left no doubt he would not have challenged or argued he did not have the ability to pay the \$20 assessment, even if *Dueñas* had been the law in 2005 or 2018. (See *Montelongo*, at p. 1034; *People v. Smith, supra*, 46 Cal.App.5th at p. 395; *People v. Gutierrez, supra*, 35 Cal.App.5th at p. 1033; but see *People v. Taylor* (2019) 43 Cal.App.5th 390, 400-401.)

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<sup>4</sup> The Legislature increased this assessment from \$20 to \$30, effective July 28, 2009 (Stats. 2009, 4th Ex. Sess. 2009-2010, ch. 22, § 29, p. 5346), and from \$30 to \$40, effective March 24, 2011 (Stats. 2011, ch. 10, § 8, p. 212).

## **DISPOSITION**

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.